Supreme Court, U.S.
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No. 01 -

In The
Supreme Court of the United States

MICHAEL REEVES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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NOVEMBER 6, 2001

7 ORP

QUESTIONS PRESENTED FOR REVIEW

Whether the Sixth Amendment right of effective assistance of counsel is abridged where the accused's trial attorney conducts no pre-trial investigation, no meaningful conference with his client prior to trial, or no adequate preparation for trial, including no comprehensive interview with the defendant, so that any advice to not testify is devoid of strategy — all resulting in prejudice to the defendant, including, but not limited to, the failure to identify and present exculpatory evidence.

PARTIES OF THE PROCEEDINGS

Counsel for petitioner presents the following list in compliance with United States Supreme Court Rule 14.1.(b):

1. Michael Reeves, an individual, is the only party to this petition; and

2. no nongovernmental corporation is a party in this proceeding.

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The opinion of the court of appeals, App. *infra*, at 20, is reported at 255 F.3d 389 (7th Cir. 2001). The district court opinion, App., *infra*, at 1, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2001. A timely petition for rehearing and petition for rehearing *en banc* was denied on August 8, 2001. App., *infra*, at 34. The jurisdiction of this Court is invoked under 28 U.S.C. § 2255.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article (VI) the Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."

28 U.S.C. § 2255 provides as follows:

> A prisoner in custody under sentence of a [district] court . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution . . . may move the court which imposed the sentence to

vacate, set aside or correct the sentence.

Unless the motions and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds . . . that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the

legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of–

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if movant was prevented from making a motion by such governmental action;

STATEMENT OF THE CASE

Michael Reeves was tried before a jury in the federal district court in Chicago in June 1998, for using the mails in a scheme to defraud his employer, Cherry Communications, Inc. ("CCI"), in violation of 18 U.S.C. § 1341. The indictment alleged that under a fictitious company name he received monies for work on two projects he did not perform or complete, thereby depriving CCI of his honest services by failing to disclose that he had engaged in self-dealing. He was represented at trial by private attorney Christopher Bohlen. The jury found him guilty. Subsequently, in June 1999, Mr. Reeves was sentenced to 24 months imprisonment.

Evidence at Trial

The evidence at Mr. Reeves' trial established that in January 1995, Mr. Reeves was employed by CCI, a small telecommunications company. (Tr. 151-153). Mr. Reeves had been hired as vice-president of engineering. (Tr. 153, 168). It was his responsibility to complete two assignments for CCI: (1) acquire and install equipment to run a switching site, through which CCI could route long-distance calls, and (2) acquire equipment to install a digital alarm system for security at its various installation and switching sites. (Tr. 157-158). CCI's owner, James Elliott, and one of its executives, Michael Dyer, testified that they lacked technical experience, so Mr. Reeves was hired for the job. (Tr. 153). Both testified that they thought Mr.

Reeves had an engineering degree because his resume listed two years at MIT and two years at Florida State University, with a B.S. in electrical engineering. They told others that Mr. Reeves was a "double E from MIT." (Tr. 155, 301).

After Mr. Reeves began his employment, he was required to submit check requisition forms for any equipment, inventory, or supplies he needed to purchase. (Tr. 155-160). Mr. Reeves submitted a requisition form for Mr. Elliott's approval in the amount of $6,627.00 for the purchase of electronic equipment from a company called Electronic Products, 6645 La Pas, Indianapolis, IN 60164. (Tr. 373-375). At the trial, a postal inspector testified that the address did not exist. (Tr. 379). Mr. Elliott claimed he did not know what was being purchased, but that he approved the requisition and authorized a CCI check written to Electronic Products which was deposited into a bank account that had been opened by Mr. Reeves in the name Electronic Renaissance. (Tr. 306).

Later, a second check requisition form was submitted to Mr. Elliott, this time in the amount of $15, 712, requesting payment to Electronic Products. (Tr. 174-177). The receipt which accompanied the request had an address for a Post Office box in Bradley, Illinois, which had been opened by Mr. Reeves. (Tr. 380). Mr. Elliott approved the request and the check was issued and deposited in the Electronic Renaissance bank account. (Tr. 175-177, 222, 309-312). Both of these checks went for installation of switching

equipment at CCI's 600 South Federal Street station in Chicago. (Tr. 158, 161, 253, 302-303, 322).

Messrs. Dyer and Elliott testified that Mr. Reeves had recommended that CCI purchase and install an alarm system for its unmanned switch sites at a cost of $88,000. (Tr. 180-182, 314-315). Mr. Elliott approved the recommendation and asked Mr. Reeves to arrange for a contract with four installment payments which Mr. Reeves agreed to do. (Tr. 182, 315). Mr. Reeves then submitted a check requisition form for the first installment in the name of the vendor Digital Alarm Products. (Tr. 178-180, 220, 313). The request was approved and the check was deposited in Mr. Reeves' Electronic Renaissance account. (Tr. 313-316).

Subsequent to the payment of the first installment, Mr. Reeves' employment at CCI was terminated (Tr. 185-186, 318-320), and, later, a second installment check in the same amount of $22,173 was sent to Digital Alarm Products and deposited in Mr. Reeves' Electronic Renaissance account. (Tr. 187-188, 222, 234) Soon thereafter, a new vice-president of engineering, Robert Carrabis, called Digital Alarm Products to inquire about delivery of the system and recognized Michael Reeves' voice on the answering machine. (Tr. 255). The third and fourth $22,173 installments were never paid on the $88,000 contract.

At trial, Messrs. Elliott and Dyer testified that they did not know that Electronic Products and Digital Alarm Products were owned by Mr. Reeves or that he

was purchasing equipment and alarm products for the switch site from companies he owned and operated. (Tr. 183-185, 187, 319). They testified that they did not know that the monies they paid those companies were going to Mr. Reeves. (Tr. 190). They also testified that they did not know if the switch site at Federal Street was ever installed. (Tr. 171, 221, 306). Messrs. Dyer and Elliott testified that the digital alarm system was never installed. (Tr. 311).

At trial, the government offered evidence that none of Mr. Reeves' business names and companies had been registered with the Illinois or Indiana Secretary of State offices. (Tr. 374-375, 380). The bank records of Electronic Renaissance showed that several checks were written but none directly to any equipment provider, and that one check had been written to Technology Programs for $12,000 and had been deposited in an account opened by Mr. Reeves' wife. (Tr. 176-178, 223, 310, 312). Mr. Reeves' trial attorney Christopher Bohlen called no witnesses at trial, put on no defense case, and Michael Reeves did not testify. It was stipulated that CCI had filed a voluntary bankruptcy petition two years after the events which were the subject of Mr. Reeves' trial.

Evidence at the 2255 Hearing

In July 1999, with new counsel, Michael Reeves filed a 2255 petition (28 U.S.C. § 2255) in the district court claiming that his conviction was obtained in violation of his Sixth Amendment right to the effective

assistance of counsel. (Appendix, *infra*, at 1). After he filed his petition, the district court judge determined that his pleadings were of sufficient merit: (1) to permit the petitioner to remain on bond pending its resolution, (2) to permit new counsel to conduct discovery in this case, (3) to permit a 2255 evidentiary hearing. By April 2000, the district court received affidavits, exhibits and depositions as well as the sworn testimony of Mr. Reeves. (App., *infra*, at 2) Evidence, consisting of exhibits attached to Mr. Reeves' 2255 petition, included reports of an independent investigator and copies of two memoranda that Mr. Reeves had provided to his trial counsel. but which had not been used at the trial, and other documents such as loan applications of Mr. Reeves, the transcript of the original jury trial and the depositions of James Elliott, Michael Dyer, and Mr. Reeves' trial attorney Christopher Bohlen. (App., *infra*, 8-10).

At the actual 2255 hearing, the evidence presented consisted of the testimony of Mr. Reeves. He testified that Mr. Bohlen met with him three times prior to the June 1998 jury trial – in September 1997, in February, and in May of 1998 – in abbreviated meetings of little or no substance. (App., *infra*, at 26). Mr. Bohlen's deposition testimony established that he took no notes and had no recollection of what was said. (App., *infra*, at 26). Mr. Reeves testified that at the first meeting he told Mr. Bohlen to visit the CCI facility on South Federal Street in Chicago because equipment he had purchased and installed was there. Mr. Bohlen confirmed he was told this, but admitted he did not go

there to confirm his client's report. Mr. Reeves also told his Mr. Bohlen that electronic equipment on the $88,000 contract was at his home, but again, Mr. Bohlen neither followed-up nor investigated. Mr. Reeves also told Mr. Bohlen that he had partially performed on the alarm system project by diagraming a plan and assembling parts, which were in his garage, but Mr. Bohlen did not take steps to see or confirm what his client told him. Mr. Reeves testified that he would have finished the $88,000 contract if he had received the final two payments. Rather than investigate, Mr. Bohlen instead required Mr. Reeves to produce documentation which Mr. Reeves lacked. Consequently, Mr. Bohlen did nothing. He neither spoke to nor attempted to interview anyone except his client, who he told not to testify. Mr. Bohlen conducted no investigation prior to trial. (App., *infra*, 26-27).

In support of his specific contention that had his lawyer Mr. Bohlen prepared for trial, it would have made a difference, Mr. Reeves offered reports of a private investigator who verified the installation of equipment at the CCI Federal Street location, plus the existence of electronic alarm parts and equipment in Mr. Reeves' garage at his home. (App., *infra*, at 27). Mr. Reeves also introduced a written memorandum to Michael Dyer, detailing the work he had performed at the time of the $88,000 contract and a letter he had written to James Elliott, stating his intention to continue to complete the project. Mr. Bohlen had been given these documents, Mr. Reeves testified, but they

were not used at trial. Mr. Reeves further testified that he, in fact, had purchased that equipment at Mr. Elliott's direction, with his knowledge, and on behalf of CCI, because the company was experiencing serious financial trouble. Mr. Reeves concluded his testimony by reviewing his professional experience and background: he had 10 years of military service, where he had FBI and top-security clearance, and had worked for several telecommunications companies. (App., *infra*, at 28). In rebuttal, the government elicited Mr. Reeves' admission that he had no documentation, invoices or checks for the equipment he had purchased for CCI and that he had used fictitious addresses on the check requisition forms. The government further offered 404(b) evidence (Federal Rules of Evidence, Rule 404(b)) that in unrelated bank loan applications there existed irregularities with respect to Mr. Reeves' personal income and his employment status, i.e. he had been terminated at CCI. (App., *infra*, at 28).

District Court's Ruling

On September 13, 2000, the district court judge issued a memorandum opinion (App., *infra*, at 1) denying the Mr. Reeves' 2255 petition. The district court addressed the trial lawyer's deficiencies – (1) in failing to conduct a meaningful interview with his client; (2) in failing to interview *any* witnesses before trial; (3) in failing to investigate leads given him by his client Mr. Reeves; (4) in failing to comprehend Mr. Reeves' defense; and (5) in failing to prepare Mr. Reeves to testify, and blindly advising him not to testify –

finding, "His attorney's failure to investigate his client's story cannot be seen to be objectively reasonable trial strategy . . . Bohlen's performance in preparing for this trial [is] dangerously and inexcusably close to the line of ineffective assistance, if not over it. While the law presumes an attorney's competence and reasonableness, I can find no reasonable trial strategy in failing to investigate this case at all." (See App., *infra.*, 13-14).

Ultimately, however, the district court ruled that Mr. Reeves was not prejudiced by his lawyer's incompetence because, based upon the district court's assessment of Mr. Reeves' testimony given in support of his 2255 petition, that Michael Reeves' offered testimony would not have changed the jury's verdict. Given Mr. Reeves' credibility problems, as the judge viewed it, the district court concluded Mr. Reeves' lawyer's incompetence did not rise to the level of constitutionally ineffective assistance of counsel. From that order, Michael Reeves appealed to the United States Seventh Circuit.

Court of Appeals Ruling

The Seventh Circuit addressed Mr. Reeves' central argument that the district court applied the wrong legal standard, i.e. by requiring him to prove that he was actually innocent, by requiring him to prove the verdict would have been different but for his attorney's incompetence; by resting its decision solely on Reeves' credibility, by ruling in pertinent part, as follows: "the very heart of the [district court's] opinion was an

examination of the totality of the evidence." (App., *infra*, at 32). With that, the Seventh Circuit held that the district court's conclusion that its confidence remained, constituted a correct application of the correct legal standard set forth in *Strickland*. The Seventh Circuit thus affirmed the district court by a virtual adoption of the district court judge's assessment of the facts and its misapplication of Sixth Amendment law to Mr. Reeves' 2255 petition.

REASONS FOR GRANTING THE WRIT

In the present case, the petitioner, a business executive, proceeded to jury trial on a mail fraud charge in the federal district court, while represented by a private attorney who only met him for three brief and unproductive meetings prior to trial, in which no real substance was discussed but wherein the petitioner provided exculpatory evidence and testimony to his lawyer, which the attorney completely ignored. Faced at trial with a key government witness, a twice-convicted federal felon, petitioner's trial lawyer took no steps to interview any witnesses nor to investigate, did not prepare for trial, presented virtually no defense and blindly advised the petitioner not to testify (without any awareness of what his client would say if he did take the witness stand). The district court judge and the seventh circuit panel agreed (and the prosecution did not dispute) that petitioner's trial lawyer was, for all intents and purposes, incompetent. Nevertheless, petitioner was denied 2255 relief (28 U.S.C. § 2255),

because – in the district court's view – the petitioner "lacked credibility" at his 2255 hearing and therefore would not have been acquitted at trial despite his lawyer's incompetence. This district court's decision, wrongly affirmed by the seventh circuit panel, misapplied the appropriate legal standard for assessing prejudice set forth by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984) and therefore this petition for a writ of certiorari must be granted.

I

The District Court Wrongfully Applied a Prejudice Standard Greater Than is Required by *Strickland v. Washington* in Denying Petitioner's Section 2255 Petition, Requiring Review and Reversal of the Circuit Court's Decision Affirming the District Court.

In order to fully appreciate the extent and degree of the prejudice to petitioner, his lawyer's incompetence must be reviewed. Trial counsel's deficiencies began with a complete failure to adequately investigate the case, to learn the government's case and petitioner's defense, and to follow leads to evidence (given him by his client prior to trial) which would have permitted him to advance a coherent trial strategy. These initial errors were compounded at the trial where, because of the lack of trial preparation, trial counsel was unable to confront the government witnesses' testimony, offer alternative explanations for the allegations of fraud, present a defense case, offer proof of actual performance of the contracts, or call his own client to the stand at a

trial (which was, at best, a swearing contest between Michael Reeves and James Elliott, his employer and key government witness). These types of deficiencies were more than adequate to satisfy the first prong of *Strickland* was satisfied. See, *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (the failure to conduct a reasonable investigation undermines the adversary process and constitutes ineffective assistance of counsel); *Clay v. Director*, 749 F.2d 427, 431-32 (7th Cir. 1984) (reversing a conviction where the defendant's trial counsel had valid defenses to present to the charges and trial counsel advised defendant to plead guilty and failed to file notice of appeal) (citing cases in which defendant was permitted to withdraw guilty plea where defenses exist which were "worthy of consideration by a factfinder" but were not presented); *Gray v. Director*, 721 F.2d 586, 595-98 (7th Cir. 1984) (attorney acting under a conflict with co-defendant did not pursue cooperation of one client or a valid defense of coercion against other represented client rendered constitutionally ineffective assistance of counsel); *Montgomery v. Petersen*, 846 F.2d 407, 412 (7th Cir. 1988) ("Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."); *Sullivan v. Fairman*, 819 F.2d 1382, 1392 (7th Cir. 1987) (trial counsel must conduct a reasonable investigation of the government's evidence).

This Court has explored the contours of prejudice in ineffective assistance claims. In *Williams*, this Court rejected a decision of the Virginia Supreme Court to

add a third requirement that a petitioner must demonstrate deprivation of "fundamental fairness." This Court held that the Virginia Supreme Court had erred (1) in requiring anything more than proof that the outcome would have been different, and (2) by failing to "evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – in reweighing it against the evidence in aggravation." *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000). This Court noted that the Virginia Supreme Court failed to give appropriate weight to the impact the presence of additional mitigating evidence might have had on a reasonable jury in the context of "the entire post-conviction record, viewed as a whole and cumulative of mitigation evidence presented originally." This Court held that where a petitioner can demonstrate that the outcome of the proceeding reasonably could have been affected, he has demonstrated a deprivation of his Sixth Amendment right.

This Court's decision in *Strickler* provides guidance on the meaning of the prejudice prong term "reasonable probability." In *Strickler* this Court explained the meaning of 'reasonable': "the question is not whether the defendant would be more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." (quoting *Kyles v. Whitley*, 514 U.S. 419, 433 (2000)). Thus, the reviewing court is not simply to determine "whether, after discounting the inculpatory

evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (*Strickler v. Greene*, 527 U.S. 263,289-91 (1999)).

Thus, the petitioner does not have to demonstrate actual innocence in order to prevail on an ineffective assistance claim. *Strickland*; *Sullivan v. Fairman*, 819 F.2d 1382, 1392 (7th Cir. 1987). And, the petitioner does not have to establish that his counsel's deficient performance would more likely than not have altered the outcome of the case. Rather, it is sufficient to generate a significant possibility that the outcome would have been different except for the unprofessional errors of counsel. *Strickler*, 527 U.S. at 298 (Souter, J., concurring). This Court has held that the petitioner raising an ineffective assistance claim does not have to establish either his factual innocence or the likelihood of success at a new trial by a preponderance, or any other, standard. The district court's insistence on addressing the question of whether the result would have "been the same" or produced a "different result" means, in this case, that Mr. Reeves' claim was subjected to a standard of prejudice significantly higher than is required by the Sixth Amendment. The district court's failure to employ the correct legal standard requires a reversal. See *Williams* (the Virginia Supreme Court rendered a "decision that was contrary to, or involved an unreasonable application of, clearly established Federal law" when it

subjected petitioner's claim to a higher prejudice test than required by *Strickland*, mandating reversal); *Glover*, 121 S.Ct. at 701 (reversing Seventh Circuit requirement of additional prejudice showing on *Strickland* error).

II

The Seventh Circuit Decision Allowed the District Court to Subject Petitioner's Claims to a Standard Higher than Required by the Constitution.

The Circuit Court's decision contravened this Court's requirements when it did not require that the district court assess prejudice in the manner required by *Strickland*. In case after case, this Court has required as a threshold that a 2255 petitioner establish a reasonable probability that the errors of trial counsel impacted the reliability of the jury's determination. *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). Here, the district court did not use a substitute definition such as is contained in *Strickler v. Greene*, 527 U.S. 263, 289-91 (1999), that reasonable probability means a "substantial possibility" that the outcome would be different.

Not only did the district court never once cite to the correct legal definition and standard of prejudice, the district court's conclusions regarding the showing of prejudice never expressed its analysis in terms of having its confidence undermined or not undermined by the newly discovered errors. Indeed, throughout its

discussion of prejudice, the district court drew a great number of conclusions about the evidence presented and the testimony of petitioner; yet never once did it state its confidence in the outcome was not undermined. Instead, the district court judge concluded that based on its subjective view of the quality of the testimony of Michael Reeves, and his exhibits submitted as corroboration, his testimony evidence failed to demonstrate that it "would have changed the verdict." Notwithstanding this clear holding by the district court, the Circuit Court rejected petitioner's argument stating that the "very heart of the district court's opinion was an examination of the totality of the evidence to determine whether the court's confidence was undermined by the new evidence." (See App., *infra.*, 32).

By looking at the "heart" of the district court's opinion's rather than its actual written words, the Circuit Court provided only insight into its own mind – for there is no textual support for the conclusion the Circuit Court reached. The Circuit Court decision cited to no portion of the district court's opinion to support its conclusion. It cited to no finding of the district court, no specific conclusion regarding any evidence, and no other written statement of the district court's opinion to support its conclusion that the correct standard was applied. In reaching the conclusion that the district court applied the correct standard, the Circuit Court relied on what the district court "must have" concluded. The actual language of the district court's opinion, however, was not one of "undermining

confidence" or "substantial possibilities" the verdict would be different, but instead was of "changing the verdict." For the district court ultimately to conclude, as it did, that "Reeves deserved much better lawyering than he received, but that in the end, the result inevitably would have been the same," required the district court to ask not if there existed confidence in the outcome of the circumstantial case of fraud advanced by the government, but rather has petitioner proven that he is innocent.

It is precisely that standard which is contrary to *Strickland* and its progeny and which set the bar at a higher level than is required by this Court and the Constitution. It is precisely for that reason, then, that Michael Reeves' Section 2255 ineffective assistance claim has been subjected to the wrong standard by the Circuit Court – out of conformity with the other claims considered by this Court – and why the Circuit Court's decision must be reviewed and reversed.

III

The Seventh Circuit Decision Was Contrary to Strickland Because It Did Not Consider the Trial Errors in the Context of the Totality of the Evidence.

The Circuit Court erred in failing to analyze the new evidence and the impact of the trial counsel's errors against the totality of the evidence introduced at trial. "In making this determination [whether a reasonable probability exists] a court hearing an ineffectiveness

claim must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695; *Strickler*, 527 U.S. at 289-91("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence;" the court is not to determine "whether, after discounting the inculpatory evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."); *Washington v. Smith*, 219 F.3d 620, 634-35 (7th Cir. 2000). "In order to determine if particular testimony might reasonably have lead to a different result at trial, as *Strickland* requires, the district court must consider the strength of the offered testimony relative to the strength of the State's case." *Lawrence v. Armontrout*, 31 F.3d 662, 667 (8th Cir. 1994)(goal of judge reviewing claim "is not to predict hypothetical outcome" of future trial).

By failing to apply the foregoing standard to Mr. Reeves' case, the central error of the Circuit Court was that it did not analyze counsel's errors in the context of the evidence at trial and the totality of the facts. At the onset, the Circuit Court did not even address (1) the weakness of the government's case, resting as it did on two simple inferences of fraud from alleged nonperformance of the Federal Street contract and alleged non-disclosure of self dealing; (2) the impact on

that weak case that the evidence of performance of the Federal Street contract would have had; and (3) the impact on that weak case that evidence of full disclosure of self-dealing would have had. The Circuit Court did not discuss at all the evidence of full performance of the Federal Street contract. This unrebutted 2255 evidence was powerfully exculpatory and proved an absence of fraudulent intent and eliminated the first major premise of the government's fraud theory. Nor did the Circuit Court address the evidence that Mr. Reeves told Mr. Elliott that the companies through which he was obtaining the equipment were his own companies and that Elliott had not only approved of such an arrangement, but had expressly requested and authorized it. A jury inclined to believe petitioner on this point would render the second major premise of the government's fraud case non-existent. Thus, with such evidence before the jury, the government's fraud theory would be completely undermined.

The Circuit Court failed to discuss how the contemporaneously written memoranda demonstrating performance on both the Federal Street contract and the Digital Alarm contract not only *fully corroborated* Mr. Reeves' testimony (thus making it more likely it would be believed) but *completely undermined* contrary testimony of Elliott and the government's theory of fraud (thus making it less likely to be believed). A faithful adherence to the requirements of *Strickland* by the district court and by the Circuit Court would have at least required a consideration of those additional facts and their impact on the totality of the evidence.

See *United States v. Morrison*, 946 F.2d 484, 500 (7th Cir. 1991)("whether such a reasonable probability exists [i.e., that counsel's performance affected the outcome of the trial] depends, of course, on the nature and strength of the government's case against him and the nature of his attorney's failures.").

Instead of engaging in an analysis of the impact of the trial counsel's errors in failing to present this evidence and establish before the trial jury these points, the Circuit Court simply concluded, paralleling the district court's failings, that the evidence [Mr. Reeves' attorney failed to present] would have had no impact on the jury's determination. To reach that conclusion, the Circuit Court made the erroneous claim that the credibility contest was *not* a one-on-one contest, i.e. Mr. Reeves vs. Mr. Elliott. Yet, the record establishes that in every relevant sense – that is, in the sense of whether Elliott knew that Mr. Reeves was self-dealing (the government's very theory of fraud) – the contest was solely between the twice-convicted CEO of the company and petitioner Mr. Reeves. Credible evidence that Elliott not only knew that Mr. Reeves was dealing through his own company but actually encouraged it because of his own bankruptcy problems, evidence provided directly through Mr. Reeves' testimony and circumstantially through the approved invoices, Mr. Reeves' history of dealing in the same company names and the contemporaneously prepared memoranda, meant that Elliott's denials were squarely met. Resolution of this contest depended solely on who the jury believed: Mr. Reeves or Mr. Elliott. No other

person was privy to the conversations between them and no other person had direct knowledge, or would even be in a position to know whether such a fact was true or not.

The Circuit Court's characterization of the government's case as a documentary case shows that the appeals court miscomprehended both the evidence at trial and the government's fraud theory. Claimed corroboration from other employees merely reflected their lack of knowledge of a fraud: neither Mr. Dyer nor Ms. Marks-Pozniak could corroborate either side, because neither was present during the discussions between Mr. Reeves and Mr. Elliott. Moreover, the documentary evidence at trial did not establish that either Mr. Reeves' or Mr. Elliott's version was true or not true; it simply showed requisition checks applied for by Mr. Reeves for equipment to be purchased by companies he owned or controlled which were then signed off and approved by Mr. Elliott. Did Mr. Elliott know that these companies were Mr. Reeves' when he signed off on the acquisitions? Mr. Elliott said no, Mr. Reeves said yes. The documents themselves, bearing both of their signatures and involvement, shed no light on that question.

Moreover, the newly presented memoranda, written by Mr. Reeves, do not show that Mr. Reeves was "covering up what he was or was not doing during his employ at CCI" as the court concluded. They are significant because they set forth contemporaneously with his employment at CCI that he had performed the

work he claimed he performed then, the very work he claimed he performed at trial, the work he established through his independent investigator that he had in fact performed, and, *contrary to the government witnesses,* the work they claimed he had not performed. What additional evidence could be more devastating to a government's fraud theory based on the failure to perform work than evidence, from testimonial, documentary, and physical inspection, which showed that the work had in fact been performed. Yet the Circuit Court's discussion (either accepting or rejecting it) of the impact of this evidence on the government's fraud theory is absent.

It has been held that where credibility between witnesses is crucial, the failure of trial counsel to make a reasonable investigation and to present evidence is squarely prejudicial under *Strickland.* See, *Washington v. Smith,* 219 F.3d 620, 634 (7th Cir. 2000) (independent evidence can tip balance in the case by "providing substance and credibility" to defense); *Montgomery v. Petersen,* 846 F.2d 407, 414-15 (7th Cir. 1988) (where "jury was presented with a straightforward credibility choice" every piece of corroborating evidence becomes "extremely significant"). This application of the *Strickland* prejudice test is directly applicable here. Yet, there is again no discussion of the closeness of the evidence, a fact squarely acknowledged by the district court but ignored entirely by the Circuit Court, or the impact of this additional evidence on the totality of the circumstances. That approach is inconsistent with the

manner in which *Strickland* requires ineffective assistance claims to be assessed and the standard which this Court traditionally and routinely applies to ineffectiveness claims. See, *Williams v. Washington*, 59 F.3d 673, 679 (7th Cir. 1995)("a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.").

IV

The Circuit Court's Decision Inappropriately Assessed the Credibility of Reeves' Testimony Against Him in Rejecting His Petition.

Finally, in affirming the denial of Petitioner Reeves' Section 2255 petition, the Circuit Court adopted the district court's negative assessment of Mr. Reeves' hearing testimony, finding it not credible. In so doing, the Circuit Court specially contravened the *Strickland* standard by not considering the totality of the circumstances in cases where credibility of the witnesses is crucial as noted above. But above and beyond that failing, the Circuit Court contravened *Strickland* by *resolving* the credibility contest rather than inquiring whether a jury confronted with the contradictory evidence could have rendered a different verdict. Ultimately, both the district court and Circuit Court panel usurped the jury's function, by disallowing any analysis of whether absent the attorney's deficiencies the verdict, or outcome, would have been affected. Clearly it would have been. The process was indeed undermined by counsel's failures and 2255 relief

should have been given.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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Suite 500
Chicago, Illinois 60606
(312) 641-3311

Counsel for Petitioner

NOVEMBER 6, 2001

APPENDICES

A. District Court Memorandum Opinion and Order

B. Seventh Circuit Opinion, *Reeves v. U.S.*, 255 F.3d 389 (7th Cir. 2001)

C. Seventh Circuit Order Denying Petition for *En Blanc* Rehearing

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL REEVES,
Petitioner,
v.

No. 99 C 4537
Judge James B. Zagel

UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM OPINION AND ORDER

Petitioner Michael Reeves seeks to vacate his conviction pursuant to 28 U.S.C. § 2255, claiming that his trial attorney failed to provide effective assistance of counsel.[1] In June 1998, a jury convicted Reeves on one count of mail fraud for devising a scheme to defraud his prior employer in violation of 18 U.S.C. § 1343. He was sentenced on June 30, 1999, and filed this petition soon thereafter. As the possibilities of actual innocence and of a per se denial of the defendant's Sixth Amendment rights became apparent soon after his conviction, neither of which necessarily would be resolved on direct appeal, the parties and I agreed that Reeves would take the unusual step of presenting his § 2255 petition during the pendency of his direct appeal. *See United*

[1]At trial, petitioner was represented by two attorneys, Christopher L. Bohlen and L. Patrick Powers. Mr. Powers is the defendant's brother-in-law and provided little to no substantive assistance during the case preparation or trial. He did sit at counsel table during the proceedings.

States v. Robinson; 8 F.3d 398, 405 (7th Cir. 1993)(petition should be entertained when the need for speedy relief is greater than the need for conservation of judicial resources); *see also Fountain v. United States,* 211 F.3d 429, 433 (7th Cir. 2000)("ineffective assistance of counsel claims ... generally are not appropriate for review on direct appeal as they often attempt to rely on evidence outside the record.") The petition is supported by several depositions, additional exhibits. and the defendant's in-court testimony. I also heard oral argument on its merits. With the new evidence in, the claim of actual innocence is significantly weaker than initially thought (perhaps due to problems of proof, perhaps not) and the *per se* Sixth Amendment violation has been abandoned (wisely, in light of my having informed the defendant in open court of his constitutional right to testify). Nevertheless, as the petition has been researched and briefed, in the interest of judicial efficiency and as the parties wish me to do, I decide it at this time.

I. BACKGROUND

A. Evidence Presented at Trial

The government presented the following case at trial. Petitioner Michael Reeves was hired by Cherry Communications, Inc. (CCI), a small telecommunications company, in January 1995. As vice-president of engineering, Reeves's primary job assignment was to acquire and install the equipment necessary to run various switch sites, through which the

company would route long-distance calls. Neither CCI owner James Elliott, nor CCI president Michael Dyer, has technical experience, so they hired Reeves for his technical expertise. Each testified that he thought Reeves had an engineering degree — his resume listed two years at NET and two years at Florida State University, with a B.S. in electrical engineering from the latter – and told others that Reeves was a "double E from MIT."

On July 6, 1995, Reeves submitted a check requisition form for Elliott's approval in the amount of $6,627 for the alleged purchase of electronic equipment from a company called Electronic products, 6645 LaPas, Indianapolis, IN 60164. A postal inspector testified that the listed address does not exist - the zip code is an Illinois zip code, and no such street address exists in Indianapolis. Elliott testified that he did not know what equipment was being purchased, but based on Reeves's representation that the purchase was necessary, he approved the request The accounting department then issued the check, and Reeves picked it up. The *check. which* bore the typewritten endorsement "Electronic Products," was deposited in a bank account that Reeves had opened under the company name, Electronic Renaissance.

On July 14, 1995, Reeves submitted a second check requisition form in the amount of $ 15,172, payable to Electronic Products, and a company invoice. This check requisition form listed the Electronic Products business address as 6264 LaPas, Indianapolis,

IN 60155, *which* address a postal inspector testified is also fictitious. The attached invoice listed yet a third address for Electronic Products, P.O. Box 307, Bradley, IL, which is a post office box Reeves had rented under the name Electronic Renaissance, and indicated that the equipment should be shipped to CCI, not at its actual address, but at one of the fictitious Electronic Products addresses. Elliott approved the request, and a check issued. Again, Reeves picked up the check, and it was deposited into the Electronic Renaissance bank account, with a typewritten endorsement. Both *checks were* meant to purchase switching equipment for CCI's South Federal Street station in Chicago.

Dyer testified that, in August 1995, Reeves recommended to him and Elliott that CCI purchase alarm equipment for its unmanned switch sites. Dyer and Elliott approved the purchase, and Reeves reported back shortly thereafter that he had found a vendor for the equipment, which would cost approximately $88,000. They asked him to negotiate installment payments, which be did. Reeves then submitted a check requisition form and invoice from the vendor, Digital Alarm Products, P.O. Box 172, Bradley, IL, seeking $88,692 payable in four monthly installments. Elliot approved the request. CCI's controller, Cherrie Marks-Pozniak, testified that when Reeves delivered the signed check requisition form to her, she asked him whether she should contact the vendor to establish a payment schedule and that he replied that he would do so, because "the vendor was kind of touchy and didn't like to talk to just anybody."

On September 7, 1995, CCI issued the first installment check in the amount of $22,173, payable to Digital Alarm Products. Reeves picked up the check, and subsequently it was deposited in the Electronic Renaissance bank account. The next day, CCI fired Reeves for poor job performance. On October 18, 1995, CCI issued the second installment check to Digital Alarm Products in the amount of $22,173, which it mailed to the address on the invoice, a post office box that Reeves had opened. This check was electronically endorsed and deposited into the Electronic Renaissance account.

Soon thereafter, Robert Carrabis, the new vice-president of engineering at CCI, called the Digital Alarm Products telephone number to inquire about delivery of the alarm system equipment, which he could not locate, and recognized Reeves's voice on the company's voice mail. Surprised, he told Dyer and Elliott, who say they found that very suspicious, and the company opened an investigation. CCI did not make the third and fourth installment payments on the Digital Alarm Products invoice.

At trial, both Dyer and Elliott testified that they did not know that Electronic Products and Digital Alarm Products were petitioner's companies, or that be was depositing the equipment purchasing checks into a bank account that he controlled. In addition, neither knew what if any equipment was purchased with the first two checks paid to Electronic Products, or whether any equipment had been delivered or installed at the

South Federal Street station. Elliott, Dyer and Carrabis all testified that the alarm system equipment, which was to have been purchased with the installment checks, had not been delivered to the company.

A search by the Illinois and Indiana Secretary of State offices failed to produce any records showing that any of Reeves's companies were incorporated or doing business in their states. It also produced several checks written by Reeves for amounts in excess of $1000 on the Electronic Renaissance account, to American Express, to Kankakee Bell Credit Union loan, to Ameritech, to AT&T, to a Dr. Martello, to himself, and to cash during this same time period. One $12,000 check, written to a company called Technology Programs, was written a few days after the $15,000 CCI check had been deposited in the account, and was deposited into a separate bank account opened by Reeves's wife.

At trial, the defendant cross-examined the government's witnesses, but put on no witnesses of his own. The parties entered a stipulation that CCI filed a voluntary petition for bankruptcy in October 1997 and that neither Digital Alarm Products, nor Electronic Products, nor Michael Reeves were listed as owing money to the company. The defense's theory was that the government had failed to meet its burden in the case, in particular because Elliott, a critical witness, was incredible due to prior criminal convictions, and the government had not sufficiently proved that any check had been mailed using the U.S. Postal Service.

B. Defense Counsel's Preparation

Reeves testified at the evidentiary hearing that he had just three interviews with his trial counsel in the weeks and months leading up to trial: one in September 1997, one in February 1998, and one in May 1998, none of which was particularly lengthy. The case went to trial in June 1998. According to Reeves, none of the interviews included a substantive discussion of the government's case or any extended discussion of his defense to the charge. Bohlen testified by deposition that he has no notes of any initial interview with his client, and only possesses notes from the period of the trial. He cannot recall in any detail what transpired at any of the meetings they had prior to trial.

Reeves says that he told his attorney the very first time they met that he had purchased and installed equipment for the switching station at South Federal Street with the first two checks, and that he could go see the equipment. Bohlen confirm this, and says that he did not investigate the matter except to ask for written documentation of the purchases, which Reeves could not provide. Reeves also says that he told his attorney that he had some of the equipment for the $88,000 contract stored at his home. Bohlen remembers being told that Reeves had an inventory of parts in his garage, some of which might have been suitable for the alarm systems project, but that he had not yet purchased any new equipment for the project. Bohlen also says Reeves told him that he had partially performed on the alarm project by diagraming and

preparing the system, and that the needed equipment would be purchased with funds from the later installation payments.

Reeves says that he provided Bohlen with copies of a memorandum he wrote to Mike Dyer on September 6, 1995, two days before he was fired, detailing the work he had done on the various projects, and with a letter he had written to Elliott in November 1995, offering to complete the project, despite his termination. Bohlen did not use these documents at trial.

Bohlen says that he interviewed no one other than Reeves in preparing for trial. He spoke to none of the government's witnesses and developed no witnesses of his own. He also performed no investigation to discover additional evidence that would support his client's version of events.

From the very start, Bohlen's advice to Reeves was not to testify. According to Reeves, Bohlen never advised him of his constitutional right to testify or explained the rationale behind his advice not to do so.

C. Evidence That Could Have Been Presented

Additional investigation by Reeves's new counsel produced the following evidence, which they submit should have been presented at trial. First, Reeves would testify that he fully performed on the first two checks by purchasing and installing the equipment at the

South Federal Street switching site, and that he partially performed on the alarm system project. He says that performance would have been completed had he received the third and fourth installment payments. He has testified that Elliott knew that he was purchasing the equipment through his own companies, and that he told him to do so because CCI was having financial problems of its own and was having trouble getting credit. Reeves flatly denies that Electronic Products, Digital Alarm Products and Electronic Renaissance are fictitious companies, saying that they have been operational for a number of years, and that he did not know that he had to register them with the Secretary of State.

In addition to his substantive testimony about the case, Reeves can provide personal information about himself, designed to bolster his credibility. He served in the military for ten years, where he had FBI and top-security clearance, and he worked for several reputable telecommunications companies before coming to CCI. Reeves has also testified that he did take isolated classes at MIT over a two-year period, although he did not complete two years of a degree program, and that he never told Elliott or Dyer that he was a "double E from MIT."

To supplement Reeves's testimony, the defense could offer the reports (and presumably the testimony) of an independent investigator who visited the South Federal Street site and Reeves's home to document equipment there. The first report documents that there

is working equipment at the South Federal Street site, which Reeves himself identified as the equipment he purchased. Reeves accompanied the investigator to the site and valued the equipment at a total dollar amount similar to the amounts CCI paid Electronic Products. The second report documents that there is electrical equipment at Reeves's home, which he personally valued at approximately $44,000. In addition, the defense offers the memorandum Reeves wrote to Mike Dyer on September 6, 1995, the day before he was fired, documenting the work he had already done on the various projects, and the letter Reeves wrote to Elliott in November 1995, indicating his willingness to complete the projects even after his termination.

Reeves contends that there are other persons who have engaged in legitimate business practices with him using his various business names who could testify that these names were used on prior contracts, presumably to establish that he was not trying to hide anything. He also believes that additional persons at CCI could testify about the work that he completed while employed by the company. Reeves does not offer the names of any of these individuals or any more detailed analysis of their testimony, nor does he offer their testimony by affidavit or deposition.

Reeves also offers additional impeachment evidence that he could have used against Elliott, namely that he owned CCI at the time the company went bankrupt and had judgments entered against it for nonpayment of taxes.

Reeves contends that all of this evidence could be used to support his defense - not offered at trial - that in 1995, he "went into the electronic market place, obtained bids, placed orders and in fact purchased and obtained electronic equipment and products for James Elliott and Cherry Communications pursuant to Elliott and his agreement that he do so for $88,642.00, and thus lacked any intent to defraud Cherry Communications."

II. DISCUSSION

To prevail on his ineffective assistance claim, Reeves must satisfy the well-worn standards established in *Strickland v. Washington,* 466 U.S. 668, 687 (1984), recently-reaffirmed by the Supreme Court. See *Williams v. Taylor,* 120 S. Ct 1495 (2000). He must demonstrate that his trial counsel's performance "fell below an objective level of reasonableness," considering all the circumstances, and that the deficient performance so prejudiced the defense that it deprived ee es of a fair trial. *Strickland* 466 U.S. at 687; *Fountain,* 211 F.3d at 434. Prejudice is established if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. In evaluating this claim, I am, of course, ever mindful that there exists a strong presumption that counsel ,rendered reasonably effective assistance. See *United States v. Muehlbauer,* 892 F.2d 664, 668 (7th Cir. 1990); see also *Strickland,* 466 U.S. at 690.

A. Bohlen's Performance

Reeves contends his trial attorney was deficient: (1) by failing to conduct a meaningful interview with his client; (2) by failing to interview any government witness or defense witness or otherwise to adequately prepare for trial; (3) by failing to investigate leads that resulted in exculpatory evidence; (4) by failing to develop and understand Reeve's only real defense; and (5) by failing to call him at trial or to advise him adequately on his right to do so. At the core of each of these charges is counsel's failure to make reasonable inquiries in preparing the case or to have a reasonable explanation for his decision not to investigate, one or the other of which an attorney is duty-bound to do. See *Strickland*, 466 U.S. at 691.

Bohlen's performance was anything but exemplary. It is undisputed that Reeves told him that he had purchased equipment for the South Federal Street site with the first two checks, yet save for asking for documentation, he did nothing to investigate or to corroborate the information. There is a factual dispute about what Reeves told his lawyer about his performance on the second project. But, even taking Bohlen's word, Reeves informed him that he had partially performed on the alarm systems project by diagraming the equipment pursuant to an agreement between him and Elliott and that he had certain equipment on hand that he thought was possibly suitable to the project. Bohlen made no effort to corroborate Reeves's word that he had performed some

work on the project and that he had some equipment on hand that was suitable for the site. Further, he made no effort to interview Elliott or Dyer or any government witness to, at the very least, judge their demeanor and credibility on the witness stand.

Given Reeves's inability to put on his proffered defense without either testifying himself or by providing corroborative evidence, his attorney's failure to investigate his client's story cannot be seen to be objectively reasonable trial strategy. In fact, in light of Bohlen's view that Reeves should not testify, his failure to try to find corroborative evidence is particularly egregious, as it guaranteed the jury would not hear the information in any form. In short, Reeves's inability to coherently and persuasively present his own defense due to credibility problems only aggravated his counsel's lack of preparation and investigation. In such a case, it is essential that counsel test his client's case by other means, and it was unreasonable for Bohlen not to do so.

Present counsel argue that perhaps the most problematic result of Bohlen's total lack of preparation and investigation in this case is that it made it impossible for him to offer reasoned advice to his client on whether to take the stand in his own defense. In a case such as this one, where there is a substantive defense that the defendant could offer, it is essential that counsel investigate that defense before helping his client make a decision whether to take the stand. While it is often the case that a defendant is well advised not to testify (and having heard Reeves testify

myself and witnessed his demeanor, I cannot necessarily disagree with that decision here), it is essential that a defendant benefit from reasoned and researched advice from counsel in making that decision.

I consider Bohlen's performance in preparing for this trial to be dangerously and inexcusably close to the line of ineffective assistance, if not over it. While the law presumes an attorney's competence and reasonableness, I can find no reasonable trial strategy in failing to investigate a case at all. Ultimately, as I discuss below, the defendant was not prejudiced by his counsel's incompetence, however. Therefore, I need not and do not decide as a matter of law whether Bohlen's representation rose to the level of constitutionally ineffective assistance of counsel.

B. Prejudice to Reeves

Assuming that trial counsel's performance constituted ineffective assistance, the next question I must ask is whether, considering all the circumstances, there is a reasonable probability that, but for counsel's unprofessional errors, the jury would not have returned a guilty verdict. Investigation by Reeves's present counsel has added several new pieces of evidence to the mix presented at trial: Reeves's testimony, additional impeachment evidence for Elliott, documentation and valuation of the equipment at the South Federal Street site and at Reeves's home; the September 1995

memorandum, and the November 1995 letter. [2]For its part, the government impeached Reeves's testimony with misrepresentations and inconsistencies he made on various loan applications, as well as on his resume.

The most significant new evidence is, of course, Reeves's testimony. He contends that had he testified and had the additional impeachment evidence been used against Elliott, a jury reasonably could have believed him and not Elliott. Having personally heard Reeves testify at the evidentiary hearing, and remembering the evidence as it came in at trial, I do not agree that Reeves's testimony — had it been offered — alone would have changed the verdict. He has too many empty explanations for the many oddities in his business practices in this case, and the government effectively cross-examined him with seemingly false statements made on numerous loan applications in the past. I found Reeves's explanations about his many businesses, and the misuse of the various fictional addresses, unpersuasive, and they are not persuasive evidence of his innocence. The fictional nature of the addresses, their mix-and-match nature, and his failure to register any of them with the Secretary of State, all

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[2]Reeves also asserts that other CCI employees could testify about work he accomplished while employed there and that other persons with whom he had done business over the years through his various companies could testify about the legitimacy of the work he did with them. That information might have been helpful. But as no actual evidence is before me, I do not assume that it exists and cannot consider it when evaluating whether Reeves was prejudiced by his trial counsel's performance.

undermines his testimony about the businesses' legitimacy.

Nor do I think the additional impeachment evidence proffered against Elliott would have damaged his credibility much more than already was done at trial. Elliott's prior convictions came in at trial and the jury considered them in its deliberations. The defense has not offered, and I do not find obvious, what Elliott's motive to lie would be in this case. Given Reeves's credibility problems. his motive to lie on the stand, and the jury's knowledge of Elliott's credibility problems at the time it considered his testimony, I do not think Reeves's testimony could have changed the jury's verdict. At best, Reeves's testimony can be heard to mean that Elliott was in on the scheme to defraud CCI as well - but pointing a finger at a possible unindicted co-conspirator is not a defense.

What, then, if the jury had considered the additional corroborative evidence as well? It is clear now that the defense cannot say that the equipment was actually purchased, or that the equipment at either the South Federal Street station or at his house is equipment Reeves bought. There is no testimony from anyone other than Reeves on this issue; the private investigator learned his information from Reeves alone. The evidence therefore suffers from the same self serving credibility problems as does Reeves"s personal testimony, as well as the additional problem that it is evidence that should be independently confirmable. Surely, other persons the installer, or the vendor, say —

could have testified as to when the equipment at the South Federal Street station — as purchased and installed and by whom. Purchase receipts could have been obtained from the vendor, or at the very least, an independent valuation procured for all the equipment. Absent any independent confirmation of Reeves's purported completion of the purchases and installation, I do not think the evidence would have impacted the jury's verdict. These are the kinds of omissions jurors notice and question. In any event, none of this evidence goes to answer the many inconsistencies and fictional addresses in the check requisition forms, or the self-dealing apparent in the deposits made to bank accounts controlled by Reeves. The September 1995 memorandum and the November 1995 letter, both of which Reeves authored, are similarly unpersuasive in light of the many unexplained inconsistencies revealed by the documents and money trail. Ultimately, all of the additional evidence comes from Reeves himself uncorroborated even after the efforts of his present and highly competent counsel, and given his own credibility problems, its submission to the jury would not have produced a different result.

This is a close case in the sense that the cold record does not mandate the result. Frankly, I would have been unable to decide this matter had I not sat through trial and had I not seen and heard Reeves testify at the § 2255 hearing. But I did, and I have come to clear judgment that Reeves deserved much better lawyering than he received, but that in the end, the result inevitably would have been the same.

III. Conclusion

For the foregoing reasons, petitioner's § 2255 petition is denied.

ENTER: James B. Zagel
United States District Judge

DATE: 13 SEP 2000

United States District Court
Northern District of Illinois
Eastern Division

JUDGMENT IN A CIVIL CASE

Case Number: 99 C 4537

MICHAEL REEVES

v.

UNITED STATES

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the petition for a writ of habeas corpus is denied.

Date: 9/13/2000

Michael W. Dobbins, Clerk of Court.

A20

No. 00-3774.

United States Court of Appeals,
Seventh Circuit.

Michael REEVES,
Petitioner-Appellant,

v.

UNITED STATES of America,
Respondent-Appellee.

Argued May 14, 2001.

Decided June 22, 2001.

Federal prisoner convicted of mail fraud filed motion to vacate, set aside, or correct his sentence. The United States District Court for the Northern District of Illinois, James B. Zagel, J., 2000 WL 1368044, denied motion, and prisoner appealed. The Court of Appeals, Bauer, Circuit Judge, held that prisoner had not been deprived of effective assistance of counsel.

Affirmed.

1. Criminal Law 641.13(1)

Defendant asserting claim of ineffective assistance of counsel bears burden of showing that his counsel's performance fell below objective standard of reasonableness and outside wide range of professionally

competent assistance, and that he suffered prejudice as result, such that, but for counsel's unprofessional errors, there is reasonable possibility that result in his case would have been different. U.S.C.A. Const. Amend. 6.

2. Criminal Law 641.13(1)

Defendant alleging ineffective assistance of counsel is not required to prove actual innocence or that outcome would have more likely than not been different. U.S.C.A. Const. Amend. 6.

3. Criminal Law 641.13(6)

Defendant convicted of mail fraud based on- his use of mails in scheme to defraud his employer was not denied effective assistance of counsel as result of counsel's failure to investigate and his recommendation that defendant not testify on his own behalf, even if credibility of main witness against him was weak because of his prior convictions, where thrust of government's case was documentary evidence, defendant was not credible witness, and new evidence presented by defendant did not undermine jury's verdict. U.S.C.A. Const. Amend. 6.

Steven Shobat, David S. Mejia (argued), Chicago, IL, for petitioner-appellant.

Brian R. Havey (argued), Office of the U.S. Attorney, Civil Division, Appellate Section, Chicago, IL, for respondent-appellee.

Before BAUER, ROVNER, and DIANE P. WOOD, Circuit Judges.

BAUER, Circuit Judge.

Michael Reeves filed a petition under 28 U.S.C. § 2255 challenging his conviction as obtained in violation of his Sixth Amendment right to effective assistance of counsel. The district court denied the petition because Reeves failed to demonstrate prejudice. Reeves appeals, and we review the denial of relief under § 2255 *de novo*. See *Blacharski v. United States*, 215 F.3d 792, 794 (7th Cir. 2000).

BACKGROUND

Reeves, represented at trial by attorney Christopher L. Bohlen (and L. Patrick Power, whose nominal role will not be discussed), was convicted by a jury in June of 1998 of mail fraud under 18 U.S.C. § 1341 for using the mails in a scheme to defraud his employer, Cherry Communications, Inc. ("CCI"), of money for work on two projects that he failed to complete and for depriving CCI of honest services by not disclosing his self-dealing.

At trial the following evidence was adduced. CCI was a long-distance telephone company headquartered in Westchester, Illinois owned by James Elliot. Elliot and CCI's President, Michael Dyer, wanted to expand the business by constructing switch sites to route calls on its long distance network. Lacking the skill to do this

themselves, they hired Reeves as Vice President of Engineering in January of 1995. Reeves' resume indicated that he had completed two years at MIT and two years at Florida State University, earning a B.S. in electrical engineering. Elliot and Dyer bragged to others that Reeves had a "double E from MIT." In reality, while Reeves had taken some classes, he never earned a degree.

To purchase equipment to construct the switch sites, Reeves was instructed to submit a check requisition form to Elliot for approval and then to CCI's comptroller, Cherrie Marks-Pozniak, who would issue a check. On July 6, 1995, Reeves submitted a check requisition form to Elliot for the purchase of $6,627 worth of equipment to be installed at the South Federal Street switch site in Chicago from a company named Electronic Products located at 6645 La Pas, Indianapolis, Indiana 60164. Elliot approved the request and Marks-Pozniak gave Reeves a check payable to Electronic Products, whereupon it was endorsed with a typewriter and deposited in a bank account Reeves had opened under the name Electronic Renaissance.

On July 14th, Reeves submitted another form to Elliot for more equipment for the South Federal Street site payable to Electronic Products for $15,172. The address listed for Electronic Products this time though was 6264 La Pas, Indianapolis, Indiana 60155. Furthermore, an invoice submitted with the check requisition form listed yet another address for Electronic Products — P.O. Box 307, Bradley, Illinois

which had been rented by Reeves under the name Electronic Renaissance. The invoice also stated that the equipment was to be billed and shipped to CCI at 6264 La Pas, Indianapolis, Indiana 60155. Despite these inconsistencies, Elliot approved the request, and again, a check was given to Reeves, endorsed with a typewriter, and deposited in the Electronic Renaissance bank account.

In August, Reeves recommended that CCI buy alarm systems to secure its unmanned switch sites. Elliot and Dyer approved the purchase of the systems for over $88,000, to be paid in four monthly installments. Reeves submitted a form for the first installment, to be paid to a company named Digital Alarm Products at P.O. Box 172, Bradley, Illinois. Marks-Pozniak asked Reeves if she should contact the vendor to set up a payment schedule. Reeves insisted that he ask himself because the vendor was "touchy" and "didn't like to talk to just anybody." CCI issued the first installment check on September 7th for $22,173. Reeves was given the check, it was endorsed with a typewriter and deposited in the Electronic Renaissance bank account.

On September 8th, although CCI was unaware of Reeves' dealings, he was fired for poor job performance. Still ignorant, on October 18th, CCI issued a $22,173 check for the second installment. Since Reeves was gone, CCI mailed it to the P.O. Box listed on the invoice, which unbeknownst to CCI was rented by Reeves. As before, the check was endorsed with a

typewriter and deposited in the Electronic Renaissance bank account.

Robert Carrabis, who became Vice President of Engineering after Reeves' termination, noticed that the alarm system had never been delivered, so he called Digital Alarm Products to inquire and heard Reeves' voice on the company's answering machine. Finally realizing that something was amiss, CCI hired a private investigator and informed the police. They discovered that neither the Illinois nor Indiana Secretary of State offices had records for companies named Electronic Products or Digital Alarm Products.

At trial, the government charged that Reeves' scheme was to submit false forms from phony equipment suppliers to obtain money from CCI to satisfy his personal debt. To prove its theory, the government offered the testimony of Elliot, Dyer, Carrabis, Marks-Pozniak, and a postal inspector who attested that the addresses given for Reeves' companies were fictitious. A bank employee also introduced the Electronic Renaissance account records and a summary chart of expenditures made from the account with money from CCI. It was also shown that Reeves' bank account had been overdrawn several times in the months before he undertook this scheme, and in June of 1995 his balance was $8.17. The government also proved that checks written on the Electronic Renaissance account with CCI's money were issued to, among others, American Express, Kankakee Bell Credit Union for a loan payment, Ameritech, Dr. Martello,

Reeves himself, and cash. Other documentary evidence included the check requisition forms and invoices submitted by Reeves and his 1995 federal income tax return showing that he did not report income realized by his companies from CCI.

Reeves' attorney cross-examined the government's witnesses. Reeves did not take the stand or present witnesses in his defense. Reeves' defense was that the government failed to meet its burden of proof because Elliot's testimony was incredible in light of his prior criminal convictions, and the government had failed to prove that any check had been mailed using the U.S. Postal Service.

After Reeves was convicted and sentenced, he filed a direct appeal, voluntarily dismissed it, and then filed a § 2255 petition. The district court permitted discovery held an evidentiary hearing, and heard oral arguments on Reeves' § 2255 petition.

At the evidentiary hearing on April 14, 2000, Reeves testified that Bohlen met with him three times prior to trial — in September of 1997, and in February and May of 1998 — and that the brief meetings were not substantive. Bohlen testified that he did not take notes of these meetings and could not recall what had been discussed. At the first meeting Reeves told Bohlen to visit the South Federal Street site because he had purchased and installed equipment there. Bohlen confirms that Reeves said this, but admits that he did not go see whether the equipment was indeed there.

Reeves also told Bohlen that some of the alarm system equipment was at his home, but again, Bohlen did not investigate the claim. Reeves further said to Bohlen that he had partially performed on the alarm system project by diagraming a plan and gathering parts, which were still in his garage. He claimed that he would have finished if he had received the final two installment checks. Instead of investigating, Bohlen asked Reeves for documentation of the purchases, but Reeves did not have any. Bohlen admitted that in preparing for trial he did not interview anyone except Reeves and told him not to testify.

In support of his contention that he had fully performed the South Federal Street job and partially performed the alarm system project, Reeves offered a report of a private investigator who visited the South Federal Street site and Reeves' garage, accompanied by Reeves. The report said that there was equipment at the South Federal Street site, which Reeves identified as the equipment he had purchased. It also stated that there was electrical equipment in Reeves' garage. Reeves also offered copies of a memorandum he had written to Dyer dated September 6th, two days before he was fired, detailing the work he had completed and of a letter be wrote to Elliot in November, offering to complete the alarm project despite his termination. Reeves had given Bohlen these documents, but they were not used at trial. Furthermore, Reeves testified that Elliot asked him to purchase equipment through his companies because CCI was having financial difficulties. Reeves claimed that his companies had been

in business for many years and were not fictitious, and he was ignorant of the fact that he had to register with the Secretary of State.

Finally, Reeves testified about his personal background, specifically that he had served in the military for ten years where he enjoyed FBI and top-security clearance and had worked for several telecommunications companies before CCI. He explained that he took some classes at MIT over a two-year period, but denied that he told Elliot or Dyer that he was a "double E from MIT."

On cross-examination, Reeves said that he had no documentation, such as invoices or checks, to show that he bought equipment for CCI. He admitted that he used fictitious addresses on the check requisition forms. He could not explain why he was the, only signatory on the Electronic Renaissance bank account since he claimed that the company was owned by someone else. Further, the government offered evidence admissible under Fed.R.Evid. 404(b), namely that Reeves had made false statements in bank loan applications, in his resume to CCI, in his 1995 federal income tax return, and in the unemployment application he filed with the State after he was fired from CCI.

Reeves contends that the new evidence supports his defense that he did not intend to defraud CCI. The district court saw it otherwise and denied the § 2255 petition. The court noted that it found Bohlen's "performance in preparing for this trial to be

dangerously and inexcusably close to the line of ineffective assistance, if not over it. While the law presumes an attorney's competence and reasonableness, I can find no reasonable trial strategy in failing to investigate a case at all." However, the district court declined to hold that Bohlen's performance, even if ineffective, prejudiced Reeves' case.

The district court summarized that all of the "new" evidence emanated from Reeves or the investigator, whose work was based on what Reeves told him. For example, the memorandum and letter were written by Reeves. No other witnesses, such as a vendor, testified that Reeves' businesses were legitimate or that he had purchased equipment for the projects. No invoices, receipts or checks were produced to verify that he had purchased equipment. No explanations were given as for why Reeves used fictional addresses on check requisition forms. The district court found that Reeves' self-serving evidence did not undermine confidence in the outcome. The court wrote: "Ultimately, all of the additional evidence comes from Reeves himself uncorroborated ... and given his own credibility problems, its submission to the jury would not have produced a different result."

The district court also found that the additional impeachment evidence for Elliot, namely the fact that he owned CCI when it went bankrupt and had judgments entered against it for nonpayment of taxes, would not have damaged his credibility beyond that already done at trial. Elliot's prior convictions had

already been testified to in order to impeach him at trial, so the jury weighed his two convictions for mail fraud and one conviction for providing false information to a federal law enforcement officer in assessing his credibility. Further, the jury heard and considered the parties' stipulation that CCI had filed a voluntary bankruptcy petition at the time of trial. The district court reasoned that since the defense offered no motive for Elliot to lie, there was no reasonable probability that a jury would assess Elliot's credibility differently.

The district court concluded that: "[h]aving personally heard Reeves testify at the evidentiary hearing, and remembering the evidence as it came in at trial, I do not agree that Reeves' testimony – had it been offered – alone would have changed the verdict." The court so held because Reeves had "too many empty explanations for the many oddities in his business practices," the "fictional nature of the addresses, their mix-and-match nature, and his failure to register any of them with the Secretary of State, all undermines his testimony about the businesses' legitimacy," and Reeves' explanations were "not persuasive evidence of his innocence." The court also added that the government had effectively cross-examined Reeves. Based on all of the foregoing, the district court denied Reeves' petition.

DISCUSSION

[1] Under *Strickland v. Washington*, Reeves bears the burden of showing that his counsel's performance fell below an objective standard of

reasonableness and outside the wide range of professionally competent assistance. See 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). He must also show prejudice, which means showing that but for his counsel's unprofessional errors, there is a reasonable probability that the result in his case would have been different. *See id.* at 694, 104 S.Ct. 2052. A reasonable probability is a probability sufficient to undermine confidence in the outcome, although merely some conceivable effect of the errors on the outcome is not enough. *See id.*

Reeves' first argument is that the district court applied the wrong legal standard to his case. In the beginning, the district court articulated the proper standard; Reeves' contention is that after the district court mouthed the correct standard it turned around and held him to a higher one. Reeves contends that the district court misapplied the prejudice prong of *Strickland* by (1) requiring him to prove that he was actually innocent, (2) requiring him to prove that the outcome would have more likely than not been different but for his attorney's errors rather than just a reasonable probability of a different outcome, and (3) resting its decision solely on Reeves' credibility instead of the totality of the circumstances, Reeves misreads the court's opinion.

[2] While Reeves is correct that requiring a defendant to prove actual innocence or that the outcome would have more likely than not been different would be an incorrect articulation or application of the

prejudice test, *see generally Glover v. United States,* 531 U.S. 198, 121 S.Ct. 696, 700-01, 148 L.Ed.2d 604 (2001), *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 1513-14, 146 L.Ed.2d 389 (2000), we find that after giving the district court's opinion a thoughtful read that there is not a scintilla of support for Reeves' analysis of the district court's opinion. It is enough to say that Reeves' appellate argument quotes the words chosen by the district court out of context. The very heart of the opinion was an examination of the totality of the evidence to determine whether the court's confidence in the jury's verdict was undermined by the new evidence. The district court concluded that his confidence in the verdict remained intact.

[3] Reeves' second argument is that if the district court had applied the correct standard it would have found that his case had been prejudiced. We disagree, Reeves paints the government's case as based on weak circumstantial evidence and Elliot's incredulous testimony. Given the weakness of the case against him, he asserts that if he had testified a different outcome may well have resulted because the jury would have been asked to resolve a credibility contest between him and Elliot. Not so. The case would not have become merely a "he said, he said" if Reeves had testified; not only did Dyer and Marks-Pozniak corroborate Elliot's testimony, but the thrust of the government's case was documentary evidence. In contrast, Reeves offered self-serving statements and documentary evidence of little relevance. The memorandum and letter offered by Reeves shed little light on the matter; they were written

by Reeves who had an overwhelming interest in covering up what he was or was not doing during his employ at CCI.

Reeves also complains that the district court improperly based its decision solely on his credibility. He asserts that the district court should not have decided whether it found Reeves credible, but rather should have decided whether confidence in the jury's verdict had been undermined. But, we read the opinion as saying exactly the latter-after hearing the evidence presented by the defendant, the court's confidence in the outcome had not been undermined. This is quite different from the court saying that it did not think that a jury would believe Reeves. Moreover, the district court lingered on Reeves' credibility as a witness because, not only was it the bulk of the new evidence, but one of Reeves' claims was that Bohlen was deficient for not allowing him to testify. In response the court evaluated whether the new evidence presented through Reeves' testimony had a reasonable probability of altering the result. The court's opinion carefully assessed all of the new evidence, including Reeves' testimony, and found that it offered little, as do we.

CONCLUSION

The district court's denial of Reeves' § 2255 petition is hereby AFFIRMED.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 8, 2001

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. LLANA DIAMOND ROVNER, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

No. 00-3774

MICHAEL REEVES,

Petitioner-Appellant,

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

v.

No. 99 C 4537
James B. Zagel, *Judge.*

UNITED STATES OF AMERICA,
Defendant-Appellee.

ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc* filed in the above-

entitled cause by petitioner-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny rehearing. Accordingly, the petition for rehearing is DENIED.